# 82-1678

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CASE #C-80-118

SUPREME COURT OF THE
UNITED STATES OF AMERICA

SPRING TERM, 1983

| | |
|---|---|
| ERIN FULTON, RICHARD W. GARRETSON, EUGENE KINSEY, ALLEN NEWLIN, MICHAEL ALLEN WARFIELD, LARRY LIVINGSTON, KENNETH YOUNG, and the class of all other employees of GUY F. ATKINSON, WRIGHT, SCHUCHART-HARBOR similarly situated, and all other members of the CARPENTERS UNION LOCAL NO. 1849, and the LABORERS UNION LOCAL NO. 348, and the IRONWORKERS UNION LOCAL NO. 14, and all similarly situated workers whose employment was suspended on March 14, 1980, due to job curtailment of that date, | ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT |
| Petitioners, | |
| vs. | |
| PLUMBERS AND STEAMFITTERS, LOCAL 598, and RAY McKNIGHT, their business agent, and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, UNION LOCAL NO. 112, | |
| Respondents, | |

AND

JOHN OSBORN, PETE R. HERNANDEZ, FRED D. HERNANDEZ, EUGENE McVEY, RICHARD LAYMAN, PAT PRICE, C.L. BEAVER, TERRY WEITZEL, ERNEST R. HOLLANDWORTH, EARL L. OWEN, L.E. LeMAY, and DAVID A. CLURE, on behalf of themselves and all other similarly situated,

Petitioners,

vs.

PLUMBERS AND STEAMFITTERS, LOCAL 598, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondents.

# PETITION FOR WRIT OF CERTIORARI

Gregory A. Beeler,
MORBECK & BEELER, INC., P.S.
313 West Kennewick Ave.
Kennewick, WA 99336
(509) 582-2184

Edwin F. Alden,
WESTLAND LIEBLER IVEY & ALDEN
3250 West Clearwater Ave.
Kennewick, WA 99336
(509) 735-3581

Attorneys for Petitioners

## QUESTIONS PRESENTED FOR REVIEW
(Rule 21.1(a))

1. Do employees of a target employer (not members of the Defendant union) have standing under §303 of the Labor Management Relations Act as amended (29 USC §187(b)), to sue for lost wages and benefits due to a Defendant labor organization's wrongful conduct violative of 29 USC §158(b)(4)?

2. Are wages "business or property" within the meaning of 29 USC §187(b)?

3. Does the language "by reason of" as employed in §303 of the Labor Management Relations Act (29 USC §187(b)) restrict standing to sue under that statute, to plaintiffs in the "target area" of defendants' illegal activity?

4. If the answer to number 3 is in the affirmative, due to facts of this case as pled by the Plaintiffs, suggest that Plaintiffs are within or without the "target area"?

5. Considering (1) the nexus between the injury alleged by plaintiffs and the statu-

tory violation and, (2) the relationship of the injury alleged to the forms of injury that Congress sought to prevent or remedy by enacting the statute, do Plaintiffs in this case have standing to sue under §303 of the Labor Management Relations Act (29 USC §187(b))?

## LIST OF ALL PARTIES
(Rule 21.1(b))

Plaintiffs

Erin Fulton
Richard W. Garretson
Eugene Kinsey
Allen Newlin
Michael Allen Warfield
Larry Livingston
Kenneth Young
John Osborn
Pete R. Hernandez
Fred D. Hernandez
Eugene McVey
Richard Layman
Pat Price
C.L. Beaver
Terry Weitzel
Ernest R. Hollandworth
Earl L. Owen
L.E. LeMay
David A. Clure

Defendants

Ray McKnight
Plumbers and Steamfitters Local #598,
United Association of Journeymen
and Apprentices of the Plumbing
and Pipefitting Industry of the
United States and Canada, AFL-CIO,
International Brotherhood of
Electrical Workers Union Local #112

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## REPORTS OF COURT OF APPEALS OPINION
(Rule 21.1(d))

The opinion and decision of the Court of Appeals decision in this case is reported as follows:

Erin Fulton, et al, vs. Plumbers and Steamfitters, et al, 695 F.2d 402 (1982).

## GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED
(Rule 21(e))

A. Petitioners seek review of a decision of the United States Court of Appeals (Ninth Circuit) entered December 28, 1982 (see Appendix C).

B. Jurisdiction of the Supreme Court to grant Certiorari in this case is conferred by 28 USC §1254(1).

## FEDERAL STATUTES INVOLVED
(Rule 21(f))

This case particularly concerns two (2) Federal Statutes: 29 USC §187 (1976) (popularly referred to as §303 of the Labor Management Relations Act) and 29 USC §158(b)(4)(D) (1976). Statutes set out verbatim in Appendices A and B, respectively.

## STATEMENT OF THE CASE

The Petitioners are employees of Guy F. Atkinson Company & Wright-Schuchart-Harbor, a joint venture (hereinafter AWSH) engaged in various construction projects for the Washington Public Power Supply System (hereinafter WPPSS), on the Hanford Nuclear Reservation in the State of Washington. Most of the Petitioners are carpenters who are members of the United Brotherhood of Carpenters and Joiners (hereinafter Carpenters Union). The other Petitioners belong to other craft unions, including Ironworkers, Laborors, Teamsters and Operating Engineers.

Respondents are Plumbers and Steamfitters Local Number 598, its Business Agent, Ray McKnight and the International Brotherhood of Electrial Workers Local 112. None of the Petitioners are members of the Respondent unions.

A dispute arose in 1979 between the Carpenters Union and Respondent unions concerning work assignments at the Hanford site. The

dispute was submitted to the AFL/CIO Impartial Joint Jurisdictional Disbutes Board (hereinafter The Board), under procedures set forth in the AFL/CIO Constitution. In November, 1979, the Board entered an award determining that some of the work at issue was within the Carpenter's Union work jurisdiction. The employer made its work assignments based upon the Board's decision.

The Respondent unions were evidently unwilling to accept the decision of The Board and, therefore, attempted to coerce their employer to make different work assignments, contrary to 29 USC §158(b)(4)(D). Efforts to coerce the employer, AWSH, included destroying work performed by carpenters on the Hanford site, a strike and a site boycott. As a result of these activities the employer was forced to suspend operations. The suspension lasted ten (10) days, resulting in a layoff of all employees at the site for a ten (10) day period.

On March 25, 1980, Petitioners filed

this action in the United States District Court against the Respondent unions under §303 of the Labor Management Relations Act (29 USC §187 (1976) (hereinafter §303)), seeking recovery of wages and benefits lost during the work suspension. The Petitioners also petitioned for class certification.

On April 24, 1981, the District Court (without reaching the issue of class certification) dismissed the Petitioners' complaint, holding that they lacked standing. On December 28, 1982, the United States Court of Appeals (Ninth Circuit) affirmed the District Court.

## BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT
(Rule 21.1(i))

Jurisdiction in the United States District Court was based upon the provisions of 29 USC §187 (which confers jurisdiction and states the cause of action), and 29 USC §158(b)(4)(D) (which further defines the cause of action).

## ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
(Rule 21.1(j))

### INTRODUCTION

It is respectfully urged that this case involves both special and important questions of Federal Law which have not been, but should be settled, by THIS HONORABLE COURT, and a decision by a Federal Court of Appeals (in this case a decision of the United States Court of Appeals for the Ninth Circuit) in direct conflict with a decision of another Federal Court of Appeals (The Sixth Circuit), on the same matter.

### I.

### CONFLICT BETWEEN THE CIRCUITS

In summary, the issue presented is whether or not employees of an employer who is the immediate target of unlawful union activity, for which liability is created by §303 of the Labor Management Relations Act (29 USC §187 (1976)) (hereinafter §303), have standing to sue under §303 for lost wages and benefits, when their work is suspended, due to

the defendant unions' activity. Very simply, the Ninth Circuit in this case answered in the negative. The Sixth Circuit has earlier, and unequivocally answered in the affirmative. Wells vs. International Union of Operating Engineers, Local 181, 303 F.2d 73 (Sixth Circuit, 1962).

In Wells, Supra, the Sixth Circuit specifically held that employees of an employer who was the target of illegal secondary activity for which §303 created a right of action, were entitled to sue. The Court stated:

> "The final question raised by the Defendants as to whether the Court had jurisdiction to hear the claims of the individual Plaintiffs, who are the employees of Tye and Wells, is without merit. Clearly, jurisdiction is conferred to permit whoever is injured to sue without respect to the amount in controversy." Wells, Supra, at 75.

While the Wells Court used the word "jurisdiction", we would submit that the context makes clear that the Court is addressing the issue of standing to sue on the part of the individual employees. The Court based its decision on the expansive language of the

statute, and specifically the word "whoever" in subsection (b) of §303. While the Wells Court did not expound at length on the reasoning behind its decision, its holding on the issue at hand is unambiguous. Defendants' claim that the individual employees lacked standing under §303, was rejected.

The Wells holding has not been overruled or discredited by any contrary case in the Sixth Circuit. Indeed, no other case directly on point arose until this case was presented to the Ninth Circuit.

Likewise, the holding of the Ninth Circuit Court of Appeals in Fulton vs. Plumbers and Steamfitters, Supra, is unambiguous. The Fulton Court stated:

> "Applying the standards as refined by McCready and informed by the policies of the National Labor Relations Act, we conclude that appellants lack standing under Section 303." Fulton, Supra, at 407.

The Fulton Court's reasoning will be discussed in greater detail below. At this point we wish to simply point out that the Court's decision is directly contrary to the

decision of the Sixth Circuit in Wells, Supra. The two cases cannot be reconciled.

II.

SPECIAL AND IMPORTANT QUESTIONS OF FEDERAL LAW

There is at present, no decision of the United States Supreme Court which clearly defines the parameters of standing under §303. Particularly, there is no decision of THIS HONORABLE COURT that sets forth criteria for standing, under §303, by third parties who are not the immediate targets of the unlawful union activity. It is respectfully urged that this is a vital question of Federal Law which should be determined by THIS COURT.

We would suggest that a critical review of the decision of the Court of Appeals in this case will reveal the public policy considerations that render this case especially important, incidentally to revealing why the Court of Appeals decision in this case is incorrect.

First of all, the Court of Appeals indicated that its decision was, at least

partially, informed by analogy to decisions construing antitrust statutes containing provisions, and language similiar to §303 (particularly §4 of the Clayton Act, 15 USC §15 (supplement 5, 1981)) (hereinafter §4). The Court of Appeals noted that the "by reason of" language of §303 also appears in §4, and concluded that judicial interpretations of §4 should provide "guidance" in construing §303. Fulton, Supra at 403. Noting that §4 standing has been determined under the "target area" test in the Ninth Circuit, the Court went on to analize this case by said test. The Court of Appeals referred to a recent decision of the United States Supreme Court, Blue Shield of Virginia vs. McCready, 102 Sup. Ct. 2540 (1982), a case dealing with the extent of standing under the antitrust laws, and then proceeded to reach a conclusion manifestly at variance with McCready, Supra, and imposing a standing test, in effect, more rigid than McCready, in §303 cases. The Court of Appeals in this case stated that the key inquiry under

the "target area rule" as they employed it, was whether or not the Plaintiff suffered the type of core injury that Congress sought to prevent by enacting the statute Fulton, Supra, at 407. The Court then determined that Plaintiffs herein lacked standing under that standard. The Court of Appeals reasoned that, inasmuch as the "target" of the illegal union activity was the employer of the Plaintiffs, rather than the Plaintiffs themselves, that the Plaintiffs were not in the "target area" of the Defendants unlawful activity. They were not, so to speak, "aimed at" by Defendants and were "hit" only incidently. The Court of Appeals emphasized that the purpose of the Defendants was, presumably, to coerce the employer to make different work assignments rather than to cause the Plaintiffs to lose wages. Fulton, Supra, at 407. We respectfully suggest that as the facts are outlined in the Plaintiffs' pleadings, it cannot possibly be said that the Plaintiffs were not in the "target area" of the Defendants'

deliberate efforts to shut down the job. Referring to Blue Shield of Virginia vs. McCready, Supra, by analogy, if the consumer of psychologists services in McCready had standing to sue under §4, for anti-competitive activity admittedly directed primarily at psychologists, then certainly the employees of an employer target of unlawful union activity designed to shut down the job site, should also have standing to sue for their lost wages and benefits! To the extent that the §4 analogy has merit, the case at hand under §303 does not extend standing nearly as far as McCready, Supra! The Plaintiffs in this case are not mere suppliers or customers of the target employer. They are employees at the job site which was the immediate focus of the Defendants' activity; activity designed specifically to shut down the job site.

In general, the parameters of standing of third parties, who may not be the immediate target of the unlawful activity complained of, is something which should be

determined by THIS COURT. The issue is a matter of profound national significance, and is currently a matter of unsettled confusion. The case at hand perfectly illustrates that innocent bystanders may be injured by activity proscribed by Federal Law, and for which a remedy is specifically provided by Federal Law (primarily for the protection of innocent bystanders) and those individuals, nonetheless, are denied relief due to a narrow and contrived construction of the Federal Statutes. The availability of the remedy carefully constructed and enacted by the Congress thereby has been denied to a class of people who most deserve and need its protection.

We would suggest that the decision of the Court of Appeals departs from the clear trend of the cases decided in other circuits, and merits the attention of THIS COURT.

The most recent and well reasoned case, dealing with standing of third parties to sue under §303, is Milner vs. International Brotherhood of Electrical Workers Local 349,

476 F.2d 8 (Fifth Circuit, 1973). Milner involved a Plaintiff engaged in the business of selling electrical supplies on a commission basis. The Plaintiff had a contractual arrangement with the company which was the target of illegal union secondary activity, according to which Plaintiff had the exclusive right in the peninsular Florida area, to sell certain products manufactured by that company. The Sixth Circuit determined that the Plaintiff had standing to sue under §303. The Milner Court stated:

> "From the preceeding discussion, it is clear that a third party can recover damages under Section 303, if he can establish the existence of some combination of the following circumstances: (1) an integrated business enterprise which includes the third party and either the primary or neutral employer; (2) direct injury to the third party's property; and (3) a principal-agent relationship between the third party and the primary employer." Milner, Supra at 11-12.

The Milner Court indicated further that in its view, the above criteria were not exclusive. It went on to say:

> "In determining whether Milner has a right to recover under Section 303, the fundamental question.....is whether such a result.....would threaten or undermine legitimate union interests..... We do not think that recognizing a right to recover in favor of Milner..... raises the spectre of such dire possibilities. Though the union's boycott in this case was intended ultimately, to bring pressure to bear, only upon Southwise, Milner was directly in its line of fire.....
>
> In our opinion, the consequences to Milner were reasonably foreseeable by the unions..... The damage sufferred by Milner was the substantial equivalent of the result which would have been produced if Milner had been the primary object of the union's secondary activity." Milner, Supra at 12. (Emphasis added).

We respectfully suggest that if the Milner Court reasoning had been followed in the case at hand, the result would have been different. Very simply, if the Plaintiff supplier was in the "line of fire" of the Defendant's conduct in Milner, the Plaintiff employees were most certainly in the "line of fire" in this case. Moreover, if the reasoning used by the Court of Appeals in this case had been employed by the Fifth Circuit in Milner, the Plaintiff in Milner would not have

had standing. While the Plaintiff in Milner may have been, so to speak, in the "line of fire", he was not exactly "aimed at", Cf., Fulton, Supra at 407. The Fulton Court's reasoning again is that one must not only be "hit" to have standing under §303, but must be "aimed at". In Milner, the Plaintiff supplier was not the actual target of the unlawful activity. The target was the company the Plaintiff supplied, and Plaintif was hurt because his sales to the target company were drastically reduced.

It is apparent then, that the Ninth Circuit would have decided Milner differently than did the Fifth Circuit. If THIS HONORABLE COURT does not undertake now to decide this issue, tremendous uncertainty will continue to prevail as to the extent of standing and the proper test to determine standing, for neutral third parties, under §303.

Moreover, the continuing uncertainty concerning the extent of standing under §303 will work to the disadvantage of innocent

third parties who most need and deserve the remedy provided by law - and those, in general, about whom Congress was most concerned when it enacted the legislation. The Congressional debates concerning this legislation are replete with references to the need to protect innocent third parties who are victims of jurisdictional strikes and secondary boycotts. See, e.g., 93 Cong. Rec. 4838(1947)(Remarks of Senator Ball). Both Defendants and the Court of Appeals referred to this same language and argued that Congress' principal aim was to protect farmers and small businessmen. A fair reading of such comments, in their context, however, reveals that the needs of farmers and small businessmen were used as illustrations of damage to innocent third parties. Those, in other words, who are not the immediate target of the unlawful activity! If innocent third party victims of a jurisdictional dispute are to receive the benefits of the remedy Congress created, they must be said to have standing. It is again respectfully urged that if any such third

party victims are to have standing, the Plaintiffs in this case must have standing. These Plaintiffs have a closer connection with the target employer, and suffered a more direct impact from the job shutdown (loss of their employment), than a Plaintiff such as the Plaintiff in Milner, Supra. Also, it is only fair to note that, whereas the Plaintiff in Milner might have had other customers, the Plaintiffs in this case lost their work, that is, their sole livelihood.

Further, we would respectfully suggest that there are policy considerations underlying the Labor Management Relations Act that call for a test for standing even broader than that employed in the antitrust cases. This thesis is elaborated in the Comment, Standing to Sue Under §303 of the Labor Management Relations Act, 45 N.Y.U.L. Rev. 539 (1970). The comment discusses the policy differences between §303 and the antitrust statutes with respect to the issue of standing as follows:

> "Courts have imposed numerous limitations on the right of recovery under

Section 4 of the Clayton Act to avoid a proliferation of suits that would unfairly burden the defendant. Most of these policy considerations are noticeably absent in Section 303 suits. First, while Section 4 compensates a victim of antitrust activity, the major thrust of the section is to encourage private damage suits as a deterrent to the illegal activity through the use of treble damages. While Section 303 naturally has some deterrent value, it is clear that the purpose of that section is compensatory..... Secondly, the "windfall" provided by treble damages under Section 4 necessitates limiting such extraordinary relief to a small number of plaintiffs. Finally, Section 4 contains a "partial pass on" situation, whereby many plaintiffs are compensated for an amount greater than the injury actually inflicted upon them by the defendant. Thus, the sum of all the plaintiffs' recoveries under Section 4 is far greater than the amount the defendant gained by his illegal conduct. Under Section 303, however, a party recovers only what he actually lost as a result of the defendant union's action.....

In sum, the policy considerations and practical impact in Limiting Standing under Section 303 are based on factors entirely different from those of Section 4 of the Clayton Act. Thus, the rules derived from Section 4 cases should not be blindly applied to Section 303." 45 N.Y.U. L. Rev., Supra at 549-51.

In addition, it may now be noted that a prevailing party under §303 (unlike §4)

may not recover attorney's fees. Summit Valley Industries vs. Local 112, United Brotherhood of Carpenters & Joiners, Sup. Ct. No. 81-497, decided June 1, 1982.

Beyond these considerations, we would point out that fears of massive, destabilizing litigation by injured employees against other unions are purely speculative. Until Fulton, Supra, the extant authority certainly seemed to allow such lawsuits (See Wells, Supra) and extensive litigation of this nature has never been reported.

The Court of Appeals in this case indicated that the purpose of the National Labor Relations Act, to promote industrial peace, would not be served by allowing standing to these Plaintiffs. The Court, without citation of authority, indicated generally that it felt "extending" liability to employees of an "injured concern" could create a financial burden and destabilizing effect upon a union, rendering it incapable of effective representation. The Court also said, again

without citation of authority, that the threat of such a liability might somehow inhibit legitimate union activity, Fulton, Supra at 408. This analysis ignores the compensatory purpose of the Labor Management Relations Act alluded to above, and conveniently ignores the fact that the employees of the target company were particularly injured by the Defendant unions' conduct. It should also be noted in this regard that liability under §303 extends only to specified, intentional violations of the Labor Management Relations Act. It does not extend to every conceivable unfair labor practice of which a union might be guilty. For example, there is no §303 liability for a union which might be adjudged to have failed to bargain in good faith. Quite simply, however, the Court of Appeal's fails to give effect to the policy of Congress in enacting §303 to provide compensation for those who might be injured by this type of deliberate union misconduct. The previously cited Comment, Standing to Sue Under §303 of the Labor

Management Relations Act (1970), also observed:

> "While the case law on the subject is slight, and poorly articulated, the Courts have given employees the right to sue under Section 303 to recover salaries lost as a result of lay-offs caused by the secondary activity.....
>
> Even if the case law is interpretated to extend recovery to third parties who are either employees of the neutral or primary employer or those who have an integrated system of business operations with such an employer, an additional rule extending recovery to other types of third parties is required. Both the legislative history and the broad wording of the LMRA indicate that these two classifications of parties with standing, do not exhaust the list of third parties entitled to recover damages under Section 303. Further proof of the intent of Congress can be found in the parity between Section 303 to give private parties a remedy in the Courts to complement the remedies available through the NLRB for the same union conduct. Since anyone, even a party having no connection with the Union activity or the employer, can file a Section 8(b)(4) charge with the Board and thus initiate the process of Board remedies, it would seem anomalous for Congress to narrowly limit a class of parties who can seek complimentary remedies under Section 303. This is particularly true where Congress chose to word the section to apply to "whoever" is injured by secondary activity. Finally, it is logical for Congress to have intended Section 303 to be a broad remedy for secondary activity because it limited the scope of prohibited activity to only those situa-

> tions where the overwhelming consensus of opinion condemns the unlawful conduct. Since Congress intended a broad application of this Section, the Courts should abide by that determination, subject only to the limitations necessary to prevent the undermining of other Sections of the statutory scheme by an overly expansive reading of Section 303." 45 N.Y.U. L. Rev., Supra at 554-56. (Citations omitted and emphasis in original).

## CONCLUSION

We respectfully urge THIS HONORABLE COURT to end the confusion and uncertainty presently existing as to the extent of standing under §303. Until that is done, many, such as the Petitioners in this case, will be improperly denied the remedy and protection that Congress provided. Innocent third parties especially will be deprived of their remedy, while the District Courts remain uncertain as to whether or not a particular class of neutral third party victims has standing under the statute. We ask THIS COURT to give effect to the language of the statute that "Whoever may be injured....." by reason of the type of union misconduct alleged here may be com-

pensated for said injury.

To this end, we respectfully ask THIS COURT to grant this petition for a Writ of Certiorari, and to consider our request that the decision of the Court of Appeals be reversed with directions to the District Court to proceed with this action on the merits.

Respectfully submitted this 17th day of March, 1983.

Gregory A. Beeler

GREGORY A. BEELER
Attorney at Law
MORBECK & BEELER, INC., P.S.

EDWIN F. ALDEN
Attorney at Law
WESTLAND, LIEBLER, IVEY & ALDEN

## APPENDIX A

29 USC §187(1976) cited herein as Section 303 of the LMRA, provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended [29 USCS § 158(b)(4)].

(b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof [29 USCS § 185] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

## APPENDIX B

29 USC §158(b)(4)(D) (1976) provides:

It shall be an unfair labor practice for a labor organization or its agents- -

. . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, here in either case an object thereof is-- . . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or

class, unless such employeer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

. . . .

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| ERIN FULTON, et al., | ) | No. 81-3405 |
| | ) | D.C. Nos. |
| Plaintiffs-Appellants, | ) | C-80-107 |
| | ) | C-80-118 |
| v. | ) | |
| | ) | |
| PLUMBERS AND STEAMFITTERS, et al., | ) | OPINION |
| | ) | |
| Defendants-Appellees. | ) | |
| | ) | |
| JOHN OSBORN, et al., | ) | |
| | ) | |
| Plaintiffs-Appellants, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PLUMBERS AND STEAMFITTERS, et al., | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

Appeal from the United States District Court
for the Eastern District of Washington
R.J. McNichols, District Judge, Presiding
Argued and submitted July 7, 1982

Before: WRIGHT, TANG and CANBY, Circuit Judges.

TANG, Circuit Judge:

This appeal is from a district court dismissal of complaints filed by appellants in these consolidated actions for damages pursuant to section 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976). The district court dismissed the complaints, holding that appellants lacked standing under section 303 to maintain the suit. We affirm.

I. Background 1/

Appellants are employees of Guy F. Atkinson Company and Wright - Schuchart - Harbor, a joint venture engaged in various construction projects for the Washington Public Power Supply System on the Hanford Nuclear Reservation in Washington. Most of the appellants are carpenters who are members of the United Brotherhood of Carpenters and Joiners (hereinafter

"Carpenter's Union"). The other appellants belong to other craft unions, including the Ironworkers, Laborers, Teamsters, and Operating Engineers.

Appellees are Plumbers and Steamfitters Union, Local No. 598, its business agent Ray McKnight, and the International Brotherhood of Electrical Workers, Local No. 112. The two appellee unions represent pipefitters and electricians employed at the Hanford construction site. None of the appellants are members of the appellee unions.

A dispute arose in 1979 between the Carpenter's Union and the appellee unions concerning certain work assignments at the Hanford construction site. The dispute was submittd to the AFL-CIO's Impartial Jurisdictional Disputes Board under procedures set forth in the AFL-CIO Constitution. In November 1979, the Board entered an award determining that part of the work at issue was within the Carpenter Union's work jurisdiction. The employer made its work assignments based upon

the award.

In March 1980, the appellee unions submitted to the site employer a demand to reassign the disputed work from the carpenters to members of the appellee unions. Shortly afterward, members of the appellee unions destroyed work completed by the carpenters at the site and encouraged a strike and site boycott. Because of these activities, the site employer suspended operations for ten days. All the employees at the site were laid off during the work suspension, resulting in a ten-day wage loss.

On March 25, 1980, appellants filed an action in federal district court against appellees under section 303 of the Labor Management Relations Act [hereinafter LMRA], 29 U.S.C. §187 (1976).2/ The complaint alleged that appellee's actions constituted a violation of section 8(b)(4)(D) of the LMRA, 29 U.S.C. § 158(b)(4)(D)(1976)3/, and sought damages for the wages lost during the work suspensions. Appellants also petitioned for class

certification.

Appellees answered with a general denial, and moved to dismiss the action on the ground that appellants lacked standing to sue under section 303. On April 24, 1981, the district court granted appellees' motion, holding that appellants lacked standing because: (1) appellant's wage loss was "incidental" and "secondary" to the alleged violation of section 8(b)(4)(D); and (2) wages are not "business or property" within the meaning of section 303 and are therefore not recoverable under the section. The question of class certification was not reached. Appellants appeal the dismissal.

## II. Discussion

In this appeal we must decide whether employees of an enterprise injured by a union's violation of section 8(b)(4)(D) of the LMRA have standing under section 303 of the LMRA to maintain a suit for damages against the offending union. Section 303(b) of the LMRA provides that "[w]hoever shall be injured in his

business or property by reason of" a union's violation of section 8(b)(4) of the LMRA has a federal cause of action to recover damages. Appellants argue that section 303 imposes no greater standing limitation than that imposed generally by article III of the United States Constitution. Relying principally on the statute's reference to "whoever", appellants maintain that any plaintiff suffering an actual loss or injury attributable to a union's violation of section 8(b)(4) has standing to pursue an action for damages under section 303.

The expansive interpretation urged by appellants overlooks the section 303 requirement that the injury must occur "by reason of" a section 8(b)(4) violation. We conclude that the "by reason of" language imposes standing limitations. We are drawn to this conclusion by comparisons to the operative effect of similar statutory language in the antitrust field, or analysis of the statute's legislative history and by interpretations of section 303's standing requirements enunciated by

courts in other circuits.

The language of section 303(b) of the LMRA is strikingly similar to that of section 4 of the Clayton Act, 15 U.S.C. § 15 (Supp. V 1981).4/ The similarity in language utilized by Congress in drafting the two sections has prompted this circuit to look to judicial interpretations of section 4 for guidance in construing section 303. Mead v. Retail Clerks International Ass'n, Local 839, 523 F.2d 1371, 1376 (9th Cir. 1975). The "by reason of" phrase appearing in section 303 also appears in section 4. This circuit has interpreted the phrase to impose standing limitations in the section 4 antitrust context. See, e.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir.), cert. denied sub nom., 414 U.S. 1045 (1973). Thus, it would seem appropriate to give a similar interpretation to the phrase in the context of the LMRA.

This conclusion follows not only from the similarity in the language of the two statutes

but also from the legislative history of section 303. The ligislative history surrounding the enactment of section 303 suggests that the similarity in language was intentional, and that Congress intended for courts to look to antitrust standing principles formulated under section 4 for guidance in interpreting the standing requirements embodied in section 303.5/ Moreover, a majority of the courts that have examined standing under section 303 have adopted standards formulated under section 4 of the Clayton Act. See Comment, Standing to Sue Under Section 303 of the Labor Management Relations Act, 45 N.Y.U.L. Rev. 539, 546, 549-51 (1970); Case Note, 43 Cin. L. Rev. 212, 215-16 (1974). For example, in United Mine Workers, Dist. 19 v. Osborne Mining Co., 279 F.2d 716 (6th Cir.), cert. denied, 364 U.S. 881 (1960), the Sixth Circuit borrowed the "direct/remote injury" test from the antitrust context and employed that standard to determine section 303 standing.6/ See also United Brick & Clay Workers v. Deena Artware, 198 F.2d 637,

644, (6th Cir.), cert. denied, 344 U.S. 897 (1952) (analogy drawn to antitrust laws in context of standing determination under section 303); Gilchrist v. United Mine Workers, 290 F.2d 36, 39 (6th Cir.), cert. denied, 368 U.S. 875 (1961) ("direct/indirect" test employed); W.J. Milner & Co. v. International Brotherhood of Electrical Workers, Local 349, 476 F.2d 8, 12 (5th Cir. 1973) ("line of fire" test prevalently employed in antitrust context utilized in determining section 303 standing).

We therefore conclude that we should look to the standing principles we have developed under section 4 of the Clayton Act for guidance in interpreting section 303's standing requirements. We are not obliged, however, to follow blindly the results obtained in the antitrust context. Our application of the principles of standing developed under section 4 have been informed by the broad remedial policies the antitrust laws reflect and seek to serve. See, e.g., Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1387 (9th Cir. 1982). The regula-

tory scheme and objectives of the National Labor Relations Act are, however, fundamentally different from the scheme and purposes of the antitrust laws. Thus, while we may look to antitrust principles for general guidance, the policies reflected in the National Labor Relations Act must inform the standards' application under section 303. We proceed with this caveat in mind.

In our circuit, section 4 standing has been determined under the "target area" test. See, e.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 127-30 (rejecting the "direct/remote injury" test and embracing the "target area" approach). The target area rule confers standing if the plaintiff was within the target area of the defendant's illegal practices and was not only "hit", but also "aimed at." Karseal v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955). A plaintiff satisfies this standard by being "within the area of the economy which [defendants] reasonably could have or did

foresee would be endangered by the breakdown of competitive conditions." In re Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973), cert. denied sub nom., 415 U.S. 919 (1974). The key to meeting this burden is a demonstration that the plaintiff suffered the type of core injury that congress sought to prevent by enacting the antitrust laws. See Solinger v. A&M Records, 586 F.2d 1304, 1311 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979). See also 2 Areeda & Turner, Antitrust Law ¶ 334d at 166 (1978). The Supreme Court recently refined these principles in Blue Shield of Virginia v. McCready, 102 S.Ct. 2540 (1982). The court held that when "faced with a claim that an injury is too remote from the alleged violation to warrant § 4 standing", a court must look to (1) the nexus between the injury and the statutory violation, and (2) the relationship of the injury alleged to the forms of injury that Congress sought to prevent or remedy by enacting the statute. Id. at 2548.7/

Applying the standards as refined by McCready and informed by the policies of the National Labor Relations Act, we conclude that appellants lack standing under section 303. This action arises from a work jurisdiction dispute. The principal object of appellee unions' illegal activities was to pressure the site employer to reassign work from the members of the Carpenter's Union to members of the appellee unions. Instead of acceding to this pressure, the employer responded by suspending operation and temporarily laying off workers. This consequence was not a "necessary and intergral" aspect of the section 8(b)(4)(D) violation. The injury alleged is too remote from the alleged violation to warrant section 303 standing. Thus, the required nexus between the injury and the section 8(b)(4)(D) violation has not been established.

It is also apparent that the injury alleged is not reflective of Congress' core concerns in prohibiting the type of conduct engaged in by appellee unions. Section 303's legislative

history reveals that Congress was principally concerned with the debilitating effect secondary activity and jurisdictional disputes have on farmers and small businesses. See, e.g., 93 Cong. Rec. 4838 (1947) (remarks of Senator Ball), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1354 (1948); S. Rep. No. 105 on S.1126, Supplemental Views, 80th Cong., 1st Sess. 54 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 460 (1948). We are unable to find any indication that Congress sought to extend the right of action afforded by section 303 to employees of an injured employer and we are unwilling to render such a broad interpretation of the statute.

The avowed purpose of the National Labor Relations Act is the promotion of industrial peace by the creation of stable collective bargaining relationships. 29 U.S.C. § 151 (1973). The imposition of unlimited liability would tend to subvert our national labor policy.

If employees of an injured concern are permitted to sue, unions would become subject to liability to a potentially huge class of plaintiffs. The plaintiffs in this case sought to represent a class of nearly 1800 employees. The resultant financial burden may have a destabilizing effect upon the union and render it incapable of effective representation. Moreover, the threat of such liability may inhibit legitimate union activity, frustrating the exercise of rights granted by the National Labor Relations Act. In light of these considerations, we are not persuaded that extension of liability to the class of employees of an injured enterprise is reflective of the core concerns that Congress sought to address by the enactment of section 303.8/

III. Conclusion

Section 303 of the Labor Management Relations Act provides a remedy to "whoever" is injured "by reason of" a labor organization's violation of section 8(b)(4). We are asked to construe this statute to confer standing to

sue to anyone who can demonstrate an injury. Having reviewed our precedents, the legislative history of section 303, and the policies of our national labor laws, we conclude that Congress did not intend to grant such a broad right of action. Appellants lack standing to pursue this action under section 303; the district court properly dismissed their complaints.9/

The judgment of the district court is AFFIRMED.

## FOOTNOTES

1/ The factual statements are taken from the complaints filed by appellants in the district court. For purposes of reviewing an order of dismissal for lack of standing, we must accept as true all material allegations of the complaints and construe them in favor of the complaining parties. Warth v. Seldin, 422 U.S. 490, 501 (1975).

2/ Section 303 provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.
>
> (b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. § 187 (1976).

3/ Appellees allegedly violated section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D)(1976), which provides in relevant part:

> (b) It shall be an unfair labor practice for a labor organization or its agents . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle of work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

. . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . .

4/ Section 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (Supp. V 1981).

5/ Section 303 was proposed and enacted as an alternative to subjecting unions to antitrust liability for secondary activity. See 93 Cong. Rec. 4834-4874 (1947) (debates over Senator Ball's proposal for antitrust sanctions and Senator Taft's compromise proposal for actual damages); Connell v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 634 (1975); Mead v. Retail Clerks International Ass'n Local No. 839, 523 F.2d 1371, 1376 (9th Cir. 1975). While this alternative legislation served to reduce the punitive impact of damage awards available under the antitrust laws, section 303, like section 4, serves both a compensatory and deterrent function. See 93 Cong. Rec. 4858 (1947) (Senator Taft commenting on the intended deterrent and remedial impact of § 303), reprinted in 2 NLRB, Legislative History of the Labor Relations Act, 1947, at 1371 (1948); Jaden Electric v. IBEW, Local 211, 508 F. Supp. 983, 987 (D. N.J. 1981); see generally Comment, Standing To Sue Under Section 303 Of The Labor Management Relations Act, 45 N.Y.U. L. Rev. 539, 549-50 (1970). Given the close similarity in the terminology employed in section 4 and section 303, the fact that section 303 was enacted in lieu of applying antitrust sanctions for secondary activity, and the commonality of functions served by the two statutes, judicial construction of section 4 may have influenced how Congress viewed the operative effect of section 303. In the legislative debates leading to section 303(b)'s inclusion in the Senate version of the Taft-Hartley amendments, Senator Morse criticized the section's apparent breadth and challenged its proponents to "find another statute that has such sweeping power as is given in this bill to bring suits when there are secondary injuries and not primary injuries." 93 Cong. Rec. 4872 (1947), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1398 (1948).

Senator Taft, the section's and bill's major sponsor, responded:

> The Senator asks for a parallel and I can give him one. Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages. But the parallel is exactly the same, only under the Sherman Act, if a group of businessmen put a small concern out of business, they are subject to a suit for damages. If a labor union does the same thing, why should it not be subject to a suit for damages?

Id. at 4872-4873.

This response indicates that the section's main sponsor anticipated that the courts would fashion standing limitations under section 303 comparable to the limitations courts created to limit the broad language governing antitrust standing under section 4.

6/ The principal problem associated with the "direct/ remote injury' test is that the standard is inherently imprecise and has consequently spawned a variety of approaches leading to results which are not easily reconciled. See United Mine Workers, Dist. 19 v. Osborne Mining Co., 279 F.2d 716 (6th Cir.), cert. denied, 364 U.S. 881 (1960) (injuries sustained by a business which dealt with a primary or neutral employer are unherently "indirect"); Gilchrist v. United Mine Workers, 290 F.2d 36 (6th Cir.), cert. denied, 368 U.S. 875 (1961) (injury to a business contracting with primary employer is "direct" if a symbiotic economic relationship exists between the two businesses and the contractor's tangible property is damaged by the union's actions); Pennsylvania Railroad Co. v. National

Maritime Union, 206 F. Supp. 797 (E.D. Pa. 1962) (interpreting Gilchrist to require only a close economic relationship between the plaintiff and the primary or neutral employer); Abbott v. Local 142, United Association of Journeymen, 429 F.2d 786 (5th Cir. 1970) (third party plaintiff has standing under section 303 where it is the alter ego of the primary or neutral employer); W.J. Milner & Co. v. International Brotherhood of Electrical Workers, Local 349, 476 F.2d 8 (5th Cir. 1973) (third party has standing if in "direct line of fire" and injury "reasonably foreseeable" by union); Sapp v. Drivers, Chauffeurs, and Helpers, Local 639, 542 F.2d 224 (4th Cir. 1976) (third party's injury direct where he was an "object" of the union's illegal activity).

7/ In addition to the legislative history and case law suggesting that section 4 standing principles should guide our interpretation of section 303 standing, the circumstances compelling the Supreme Court to adopt the McCready test are equally present in the case before us. In determining the parameters of standing under section 303 we assume that Congress did not intend to allow every person tangentially affected by a section 8(b)(4) violation to maintain an action for damages under section 303. Cf. Blue Shield of Virginia v. McCready, 102 S.Ct. at 2547-48. As in McCready, we are faced with a claim that an injury is too remote from the violation to warrant standing. We are also without any direct guidance from Congress as to the point beyond which liability should not extend.

Id.

8/ Our conclusion that appellants lack standing to sue for damages under section 303 does not leave them without a remedy. Section 10(K) of the Labor Management Relations Act, 29 U.S.C. § 160(K) (1976) authorizes the NLRB to hear and determine work jurisdiction

disputes upon the filing of an unfair labor practice charge under section 8(b)(4)(D), 29 U.S.C. 158(b)(4)(D) (1976). This procedure provides an expedited review and affords substantial protection to employees caught up in such a controversy.

9/ Section 303 permits recovery for injuries to "business or property." Appellees urge us to interpret this phrase to include only commercial interests or enterprises and to exclude loss of wages. We have heretofore not been called upon to determine the parameters of the "business or property" phrase contained in section 303. The identical phrase appears, however, in section 4 of the Clayton Act, 15 U.S.C. § 15 (Supp. V 1981) and it may be proper for us to look to judicial interpretations of the section 4 phrase for guidance in construing the phrase in the context of section 303. In Ostrofe vs. H.S. Crocker Co., 670 F.2d 1378 (1982), we held that an employee has standing to sue for damages incurred as a result of his discharge for his refusal to participate in effectuating an antitrust conspiracy. Id. at 1385. Although we did not expressly discuss the "business or property" limitation, it was implicit in our holding that the loss of employment in that context was within the "business or property" concept. Contrary results have been reached by other circuits on this issue. Compare Daily v. Quality School Plan Inc., 380 F.2d 484 (5th Cir. 1967) (loss of employment constitutes injury to business or property); Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967) (terminated employee injured in his business or property) with Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), cert. denied, 411 U.S. 938 (1973) (termination of employment not injury to business or property unless job constitutes commercial enterprise or venture). We note that recently the Supreme Court has implicitly given wide latitude to the business or property

limitation in holding that a consumer of services has standing under section 4 of the Clayton Act to sue for harm incurred as a result of anticompetitive practices directed at the provider of those services. Blue Shield of Virginia v. McCready, 102 S.Ct. 2540 (1982). Moreover, the Sixth Circuit apparently does not view loss of wages as outside the bounds of the section 303 business or property concept. Wells v. International Union of Operating Engineers, Local 181, 303 F.2d 73, 75 (6th Cir. 1962). Nevertheless, we do not find it necessary to reach the merits of appellee's "business or property" argument since we have concluded that appellants lack standing on other grounds. Appellees also assert that the dismissal of the suit should be affirmed on the grounds that appellants failed to exhause internal union remedies provided by article XX of the AFL-CIO Constitution, citing Santos v. District Council of Carpenters, 547 F.2d 197 (2d Cir. 1977), after remand, 619 F.2d 963 (2d Cir. 1980). Because we conclude that the suit was properly dismissed for lack of standing, we need not reach this argument.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

| | | |
|---|---|---|
| ERIN FULTON, RICHARD W. GARRETSON, et al, | ) | |
| Plaintiffs, | ) | No. C-80-107 |
| vs. | ) | |
| PLUMBERS AND STEAMFITTERS, LOCAL 598, et al, | ) | |
| Defendants. | ) | |
| JOHN OSBORN, et al, | ) | |
| Plaintiffs, | ) | No. C-80-118 |
| vs. | ) | |
| PLUMBERS AND STEAMFITTERS, et al, | ) | MEMORANDUM AND ORDER |
| Defendants. | ) | |

The plaintiffs in these consolidated actions have moved for certification of a class pursuant to Fed.R.Civ.P. 23. In considering this motion, the Court has encountered the separate issue of whether plaintiffs have proper standing to bring their actions under 29 U.S.C. § 1987. Defendants urge

the Court to dismiss the complaints in both actions for this reason; plaintiffs have responded to this issue in their reply memorandum. Moreover, both sides devoted substantial time to the issue during oral argument on plaintiffs' Motion to Certify Class. It is proper, therefore, to consider and decide the standing question at this juncture of the case. Because I have concluded that plaintiffs lack standing to sue and their actions must therefore be dismissed, it is unnecessary for me to decide the question of class certification.

The following facts are not in dispute:

1) The individual named plaintiffs and the class they seek to represent are members of certain local unions employed at the Washington Public Power Supply System (WPPSS) construction project at Hanford, Washington.

2) Defendants are the bargaining representatives for their respective union members who are also employed at the WPPSS Nuclear

Project. None of the plaintiffs are members of the defendant unions.

3) A jurisdictional work dispute arose between the defendant unions and the carpenters union.

4) All work at the jobsite was temporarily suspended by WPPSS on March 14, 1980 for reasons related to the jurisdictional work dispute described above.

5) Plaintiffs' allegations, if proved, would support a finding that defendants, through their conduct in the work dispute, committed an unfair labor practice under 29 U.S.C. § 158(b)(4).

Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187 provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations

> and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

The issue raised in the instant cases is whether the language of § 303 provides a right of action to members of neutral labor organizations for alleged wage losses under the circumstances of this case.

Research has revealed limited decisional authority on this question. Plaintiffs rely upon Wells v. International Union of Operating Engineers, 303 F.2d 73 (6th Cir. 1962), as supportive of their position. In Wells, the court decided, without elaboration, that employees of a primary employer could recover damages under § 303. The position taken in Wells, however, has since been refined by a later line of cases culminating with W.J. Milner & Co. of Florida v. International Brotherhood of Electrical Workers, Local 349 476 F.2d 8 (5th Cir. 1973) In Milner, the Fifth Circuit traced the cases beginning

with United Brick and Clay Workers v. Deena Artware, 198 F.2d 637 (6th Cir. 1952). The court noted that application of § 303 generally had been limited to neutral and primary employers, but cited cases where this rule was extended to include third parties other than neutral or primary employers. Those cases involved two types of situations: (1) where an integrated business or an alter-ego relationship exists between the plaintiff and the primary or neutral employers, or (2) where there has been direct, as opposed to incidental, damage sustained by the plaintiff. The Milner court construed Wells as falling into the latter category.

> Although the [Wells'] court failed to give adequate explanation for this conclusion, it is implied from the opinion that these employees were considered to be the object of secondary boycott just as much as the primary employer was because they were the very individuals sought to be organized by the union.

The court in Milner went on, however, to reject that line of case law because "[n]one of the decisions that we have discussed under-

took a specific analysis of this issue in light of the purposes and policies of the Labor Management Relations Act. The deficiencies in [that] line of cases in this connection makes them less persuasive then they might have been." 476 F.2d at 12. The court held that "[i]n determining whether Milner has a right to recover under § 303 the fundamental question in our estimation is whether such a result if followed in all similar situations would threaten or undermine legitimate union interests. . . ." Id.

I agree with this reasoning adopted by the Fifth Circuit. Although under the facts in Milner the court held for the plaintiff, I find that the facts and circumstances in the instant cases call for a different result.

Plaintiffs seek the certification of a class which they estimate to be eighteen hundred in number. None of the class members allege a direct or intentional injury from

the conduct of the defendant unions; rather, plaintiffs' wage losses are purely secondary and incidental. The ruling sought by plaintiffs would have a stifling effect on the ability of unions to pursue in good faith their lawful rights. Such a rule would allow all employees affected by the conduct of an unrelated union on the same worksite to recover damages if the conduct of such union were later determined to constitute an unfair labor practice.

If the courts permit such expansive litigation involving indirect losses such as are claimed here, the ability of labor to exercise its rights under the national labor policy of this country would be seriously jeopardized. If such claims are to be allowed, clear authority should come from the Congress.

There is nothing to be gleaned from the legislative history of § 303 which indicates an intent of Congress that persons in plaintiffs' position should be allowed

a right to sue under § 303. On the contrary, the only references in the Congressional Record concern the protection of small businessmen, 93 Cong. Rec. at 5060, and farmers, 93 Cong. Rec. at 5062.

Finally, § 303 plainly states that damages are limited to injuries to "business or property." While the courts have not defined this phraseology in the context of § 303, the Supreme Court has interpreted "business or property" as it appears in § 4 of the Clayton Act, 15 U.S.C. § 15. In Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 264 (1971), the court held: "Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises." Absent Congressional expression to the contrary the same meaning should logically attach to the language of § 303. Given such a meaning, it is clear that wages earned by an employee are not commercial interests or

enterprises within the meaning of that section.

For the reasons stated above, the consolidated actions Nos. C-80-107 and C-80-118 are DISMISSED. The Clerk shall enter judgment in favor of the defendants.

IT IS SO ORDERED.

DONE BY THE COURT this 24th day of April, 1981.

_____
Robert J. McNichols
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

| | | |
|---|---|---|
| ERIN FULTON, RICHARD W. GARRETSON, et al, | ) | |
| Plaintiffs, | ) | No. C-80-107 |
| vs. | ) | JUDGMENT |
| PLUMBERS AND STEAMFITTERS, LOCAL 598, et al, | ) | |
| Defendants. | ) | |

This action came on for hearing before the Court, Honorable Robert J. McNichols, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the consolidated actions Nos. C-80-107 and C-80-118 are dismissed and judgment is entered in favor of the defendants.

Dated at Spokane, Washington, this 24th day of April, 1981.

_____

Clerk of the Court

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